Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

IVAN VAN RIJK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves the forfeiture under 19 U.S.C. § 1497 of diamonds and jewelry valued at $394,000. Section 1497 allows forfeiture when a person fails to declare any articles being brought from a foreign country into the United States, even if the articles are not subject to duty. This Court has characterized § 1497 as a civil *in rem* forfeiture provision that is "completely remedial". *United States v. Bajakajian*, 524 U.S. 321, 343 (1998). The Ninth Circuit Court of Appeals, interpreting *Bajakajian*, has held in this case that forfeitures under § 1497 are not subject to constitutional limitation.

The question presented is whether full forfeiture under a remedial civil *in rem* statute such as § 1497 violates either the Due Process Clause of the Fifth Amendment or the Excessive Fines Clause of the Eighth Amendment, when the trial court has found that full forfeiture does not serve the remedial purposes of the statute and that full forfeiture would be grossly disproportional to the offense committed.

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The Petitioner, Ivan Van Rijk, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals for the Ninth Circuit, Case No. 99-35514 is attached hereto as Appendix A. The District Court's decision, Case No. C98-0068WD (W.D. Wash.) is attached hereto as Appendix B. These decisions are unpublished.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 2001. A petition for reconsideration and suggestion for rehearing en banc was filed on April 30, 2001, and the order respecting this petition was entered on June 4, 2001 (Appendix D). The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

19 U.S.C. § 1497

Penalties for failure to declare

(a) In general. (1) Any article which —

(A) is not included in the declaration and entry as made or transmitted; and

(B) is not mentioned before examination of the baggage begins —

(i) in writing by such person, if written declaration and entry was required, or

(ii) orally, if written declaration and entry was not required;

shall be subject to forfeiture and such person shall be liable for a penalty determined under paragraph (2) with respect to such article.

(2) The amount of the penalty imposed under paragraph (1) with respect to any article is equal to —

(A) if the article is a controlled substance, either $500 or an amount equal to 1,000 percent of the value of the article, whichever amount is greater; and

(B) if the article is not a controlled substance, the value of the article.

STATEMENT OF THE CASE

This petition concerns a civil *in rem* forfeiture of diamonds and jewelry at the U.S.-Canada border, valued at $394,000. The trial court found this forfeiture to be grossly disproportional to the offense committed and not justified by any conceivable remedial purpose, and initially found the forfeiture to be unconstitutional. On reconsideration, however, the district court granted full forfeiture, based on *United States v. $273,696 and Regina Puzo*, Claimant, 164 F.3d 462 (9th Cir. 1999) ("*Puzo*"), a Ninth Circuit decision interpreting *United States v. Bajakajian*, 524 U.S. 321 (1998).

The Petitioner, Ivan Van Rijk, a 63 year old Canadian citizen, attempted U.S. entry at the border in Blaine, Washington on November 28, 1993. Instead of proceeding to secondary inspection, as instructed by the inspecting officer, he simply drove away. Within about three blocks he was stopped and arrested, and all assets in his possession were seized and subjected to forfeiture. Mr. Van Rijk, a jeweler by trade, had approximately $394,000 worth of jewelry in his car, which he failed to declare. These assets constituted the entire working capital of his jewelry business. His car and currency worth $13,313 were also seized. Upon his arrest, Mr. Van Rijk immediately cooperated with the authorities.

For his offense, Mr. Van Rijk paid a penalty of $10,500 pursuant to 19 U.S.C. § 1433 and § 1436. In addition to the penalty, the Customs Service has also sought full forfeiture pursuant to 19 U.S.C. § 1497 of all of Mr. Van Rijk's diamonds and jewelry.

The trial court considered whether full forfeiture was justified by the remedial purpose of the statute, 19 U.S.C. § 1497, and whether full forfeiture would be excessive in relation to Mr. Van Rijk's offense. The seized items are neither contraband nor prohibited items. Many of the items (diamonds and jewelry of Canadian origin) are not subject to any duty at all.[1] According to the trial court, the maximum duty owing on the diamonds and jewelry owned by Mr. Van Rijk would be $19,105, and the most the government could claim for the costs of investigation and enforcement was $50,000. In accordance with the Sentencing Guidelines, the Court found the appropriate penalty for Mr. Van Rijk to be a fine of $11,000. Thus, the trial court stated:

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1. Duties on merchandise coming into the United States are assessed according to the Harmonized Tariff Schedules of the United States (HTSUS). The HTSUS establishes the following rates of duty for the assets seized from Mr. Van Rijk:

Loose Diamonds	Duty Free
Mounted Jewelry and Findings	6.5% or CA

HTSUS, Tariff Classification Number 7102.39.00; Tariff Classification Number 7113.19.50. The classification "CA" refers to the United States-Canada Free Trade Agreement, and means that jewelry that is Canadian in origin can enter the United States duty free. HTSUS, General Note 3(c)(vii). Jewelry that is U.S. in origin is duty free under Tariff Classification Number 9801.

> To forfeit $394,000 worth of property on the basis of what happened here would manifestly go far beyond any possible remedial purpose.

Petitioner's Appendix C ("Oral Judgment"), p. 18a.

Further, the trial court had no difficulty finding that the full forfeiture of all Mr. Van Rijk's assets would be grossly disproportional to the gravity of the offense. The court stated:

> [I]s the attempted forfeiture of the property the value of which is $394,000 grossly disproportional to the gravity of the offense? I have no doubt that it is and that a forfeiture of the full properties involved here would be, in substance, an excessive fine in violation of the Eighth Amendment.

Pet. App. C, p. 22a. The court held that given the gravity of the offense and the remedial purposes of the statute, any forfeiture in excess of $80,105 would violate the Eighth Amendment. Therefore, in a decision entered on November 20, 1998, the court allowed forfeiture only up to a maximum amount of $80,105.

On January 6, 1999 the Ninth Circuit issued its decision in *United States v. $273,696 and Regina Puzo*, Claimant, 164 F.3d 462 (9th Cir. 1999). In *Puzo*, the Ninth Circuit, interpreting *United States v. Bajakajian*, 524 U.S. 321, 343 (1998), held that forfeiture under § 1497 is "completely remedial" and therefore not subject to the Eighth Amendment.[2] Shortly after the *Puzo* decision was issued,

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2. No petition for certiorari was filed in *Puzo*, and thus this court has not had an opportunity to review the correctness of that decision.

the government filed a motion requesting the trial court to reconsider its November 20, 1998 decision. The trial court granted the government's motion to reconsider, and on April 26, 1999 entered Judgment allowing full forfeiture of all Mr. Van Rijk's diamonds and jewelry.

On appeal the Ninth Circuit held that because § 1497 is "completely remedial", the statute "requires that a judgment of forfeiture be entered as to all jewelry and precious stones", even when full forfeiture is grossly disproportionate to the offense and when full forfeiture serves no possible remedial purpose. Pet. App. A. According to the Ninth Circuit's decision, forfeitures under § 1497 are not limited by the Excessive Fines Clause of the Eighth Amendment because such forfeitures are "entirely remedial and thus nonpunitive". *Id.* at 3a, *citing Puzo*. Moreover, the Ninth Circuit held, forfeitures under § 1497 cannot violate the Due Process Clause because "[t]here is no authority to support the application of the due process clause to overturn a civil forfeiture as an excessive fine." *Id.* at 3a n.6. Hence the Ninth Circuit allowed full forfeiture of all Mr. Van Rijk's diamonds and jewelry.

The Petitioner filed with the Ninth Circuit a motion to reconsider and suggestion for rehearing en banc. The Court of Appeals denied this motion, and this petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

A. This Court Should Grant a Writ of Certiorari in order to Resolve an Important Question of Federal Law That Has Not Yet Been Settled By This Court.

This Court has drawn a distinction between punitive *in personam* civil penalties (including forfeitures) and civil *in rem* forfeitures. According to *United States v. Bajakajian*, 524 U.S. 321 (1998), *in personam* forfeitures that are designed to impose punishment are subject to the Excessive Fines Clause of the Eighth Amendment; the forfeiture is invalid under the Eighth Amendment if it would be grossly disproportional to the underlying offense. *Id.* at 328. In contrast, civil *in rem* forfeitures are regarded not as punishment for an offense but instead as serving certain remedial purposes. *Id.* at 330-331. This Court has not answered the question of what the Constitution requires when a civil *in rem* forfeiture would not serve any possible remedial purpose and, as applied, would be grossly disproportional to the underlying offense. This Court should grant certiorari in order to resolve the important question of whether there are any Constitutional limits on civil *in rem* forfeitures, and if so what those limits are.[3]

The question of constitutional limits on civil forfeitures has become increasingly important in recent years. Although

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3. On April 25, 2000 the Civil Asset Forfeiture Reform Act ("CAFRA") was enacted into law. Pub. L. No. 106-185, 114 Stat. 202 (April 25, 2000). This statute legislatively codified the principle that forfeitures are not valid if "grossly disproportional" under the Excessive Fines Clause. 18 U.S.C. § 983(g). However, CAFRA does not apply to forfeitures under title 19 of the U.S. Code (customs forfeitures).

the government has had authority for over 200 years to forfeit assets in civil *in rem* proceedings, such authority was rarely used as a law enforcement tool until the 1980's. The Comprehensive Crime Control Act of 1984 established a Forfeiture Fund within the U.S. Customs Service to hold the proceeds of forfeitures. In October 1992 Congress created the Treasury Forfeiture Fund to supersede the Customs Fund. Treasury Forfeiture Fund Act of 1992, Public Law No. 102-393, 31 U.S.C. § 9703 (1992). This fund is generally used to meet the "business expenses" of seizures and forfeitures, including reimbursement to federal and local police agencies for their investigative and enforcement expenses. U.S. Department of Treasury, "Accountability Report, Fiscal Year 2000", p. 10. However, this fund has always collected more than is necessary for this remedial purpose, and the excess funds have been used for unrelated activities, including the payment of rewards for information leading to new seizures and forfeitures. GAO/HR-95-7, "Asset Forfeiture Programs", p. 12. In addition, there is a "Super Surplus" of funds available after all the remedial expenses have been paid. *Id.* at 13. In FY 2000 there was a "Super Surplus" of $142,000,000 that was available for other law enforcement activities. These funds were used to provide protection to candidates during the 2000 Presidential campaign. *Id.* at 15. In 1995 "Super Surplus" funds were used to provide financial support to South African law enforcement agencies in order to help ensure the success of the post-apartheid government. U.S. Department of Treasury, "Treasury Forfeiture Fund, FY 1997 Annual Report", p. 14.

This Court has expressed concern about "the expanding use of ostensibly civil forfeitures . . . , a development doubtless spurred by the increasingly inviting prospect of its profit to the Government", and has indicated that review

of non-punitive forfeitures should not be "as rare in the future as it has been in the past." *Hudson v. United States*, 522 U.S. 93, 114 (1997) (Souter, J., concurring). Similarly: "it makes sense to scrutinize governmental action more closely when the State stands to benefit." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 56 (1993), *quoting Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.). The dissent in *Bajakajian* argued that it is "unsound" to remove civil *in rem* forfeitures "from any excessiveness inquiry at all." 524 U.S. at 344 (Kennedy, J., dissenting). *See also Bennis v. Michigan*, 516 U.S. 442, 457 (1996) (Ginsburg, J., concurring) (forfeiture of automobile used to pick up a prostitute could be regarded as an acceptable remedial measure because the court "stands ready to police exorbitant applications of the statute"); *id.* at 464 (Stevens, J., dissenting) ("The State attempts to characterize this forfeiture as serving exclusively remedial, as opposed to punitive, ends. . . . Even if the State were correct, that argument would not rebut the excessiveness of the forfeiture").

The trial court in this case found that full forfeiture of all the diamonds and jewelry would not serve any possible remedial purpose. Pet. App. C, 18a. The goods are not contraband or prohibited items. All of the loose diamonds and most of the items of jewelry could have entered the United States duty free. As to these items the offense committed by Mr. Van Rijk was a reporting offense, namely the failure to declare goods being brought into the United States that are not otherwise illegal or subject to duty.[4] And the trial court found that full forfeiture is

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4. In this regard, the items are similar to the currency subject to forfeiture in *Bajakajian*; they are not subject to forfeiture as an "instrumentality". *See Bajakajian*, 524 U.S. at 334 n.9 ("The currency in question is not an instrumentality in any event

(Cont'd)

far more than the amount necessary to reimburse the government for its enforcement expenses. In short, "To forfeit $394,000 worth of property on the basis of what happened here would manifestly go far beyond any possible remedial purpose." *Id.*

Furthermore, as the trial court noted, if such a forfeiture is permitted, then it is permissible even if the value of the assets to be forfeited is $4 million rather than $400,000. In any event, there is a windfall to the government that cannot be justified by any remedial purpose.

It is well established that a civil remedial sanction is invalid under the Due Process Clause if the sanction is not rationally related to the statute's remedial purpose. For example, in *Seling v. Young*, 121 S. Ct. 727 (2001), a case involving civil commitment of sex offenders, this Court acknowledged that the prisoner could bring a Due Process claim if the statute as applied is not reasonably related to the remedial purpose of the statute.

> [D]ue process requires that the conditions and duration of confinement under the Act bear some reasonable relation to the purpose for which persons are committed.

121 S. Ct. at 736. The concurring justices agreed:

> This is not to say that there is no relief from a system that administers a facially civil statute in a fashion

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(Cont'd)

. . . ; the currency is merely the subject of the crime of failure to report. Cash in a suitcase does not facilitate the commission of that crime as, for example, an automobile facilitates the transportation of goods concealed to avoid taxes").

> that would render it criminal. The remedy, however, is not to invalidate the legislature's handiwork under the Double Jeopardy Clause, but to eliminate whatever excess in administration contradicts the statute's civil character.

121 S. Ct. at 738 (Scalia, J., concurring). *See also Hudson*, 118 S. Ct. at 495 ("The Due Process [Clause] . . . protect[s] individuals from sanctions which are downright irrational"); *Missouri Pacific RY Co. v. Tucker*, 230 U.S. 340, 351 (1913) (imposition of $500 as liquidated damages found to be grossly out of proportion to the possible actual damages and "so arbitrary and oppressive that its enforcement would be nothing short of the taking of property without due process of law"); *United States v. Salerno*, 481 U.S. 739, 747 n.4 (1987) (at some point pre-trial detention may become excessively prolonged and therefore punitive in relation to the regulatory goal). *Cf. BMW of North America v. Gore*, 517 S. Ct. 559, 568 (1996) (punitive damages imposed against a tortfeasor violate Due Process if they are "grossly excessive" in relation to the state's legitimate interest in deterring the conduct); *Bennis v. Michigan*, 516 U.S. 442, 456 (1996) (Thomas, J., concurring) (if after forfeiture the state keeps excess funds beyond what is necessary to cover the state's costs, then the forfeiture may become punishment rather than a "remedial" action). Thus, in a variety of contexts, the Supreme Court has recognized that if a sanction imposed under a remedial statute is not rationally related to the underlying remedial purposes, then the Due Process Clause has been violated. This Court should grant a writ of certiorari in order to make clear that the same general principles of Due Process that apply to other civil sanctions also apply to civil *in rem* forfeitures.

This Court has also suggested that a remedial statute as applied in a particular case may constitute punishment in violation of the Excessive Fines Clause. It is appropriate for this Court to grant certiorari in order to clarify that civil *in rem* forfeitures may be invalid under the Excessive Fines Clause if, as applied, the forfeiture is grossly disproportional to the underlying offense committed.

In *United States v. One Lot Emerald Cut Stones*, 409 U.S. 232 (1972) this Court recognized § 1497 as a "civil and remedial" statute. The statute prevents forbidden merchandise from entering the United States and it "provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government for investigation and enforcement expenses." 409 U.S. at 237. Therefore, the Court held, there is no violation of the Double Jeopardy Clause when the government seeks a civil remedial forfeiture of the defendant's property after the defendant has been acquitted on criminal charges.

Subsequently, in *United States v. Halper*, 490 U.S. 435 (1989) (a case involving the assessment of a fine under the False Claims Act), the Supreme Court discussed *Emerald Cut Stones* and stated:

> The relevant teaching of these cases [including *Emerald Cut Stones*] is that the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being deemed to have imposed a second punishment for the purpose of double jeopardy

> analysis. These cases do not tell us, because the problem was not presented in them, what the Constitution commands when one of those imprecise formulas authorizes a supposedly remedial sanction that does not remotely approximate the Government's damages and actual costs, and rough justice becomes clear injustice.

490 U.S. at 446. According to the decision in *Halper*, the decision in *Emerald Cut Stones* "simply does not address the question we face today: whether a civil sanction, in its application, may be so divorced from any remedial goal that it constitutes 'punishment'." 490 U.S. at 443. In *Halper*, the Court found that if the sanction imposed (a fine of $130,000) goes beyond the remedial purposes of the statute, then the statute as applied constitutes punishment and is invalid as a violation of the Double Jeopardy Clause. 490 U.S. at 452.

This Court has since rejected *Halper*'s as-applied analysis for purposes of the Double Jeopardy Clause; the Court has so held in the context of civil *in rem* forfeitures, *United States v. Ursery*, 518 U.S. 267 (1996), in the context of other civil penalties, *Hudson v. United States*, 522 U.S. 93 (1997), and in the context of civil commitment, *Seling v. Young*, 121 S. Ct. 727, 735 (2001). Thus, *Halper*'s as-applied analysis is not viable in a Double Jeopardy challenge.

However, several Justices of this Court have consistently indicated that the "as-applied" analysis is viable for purposes of the Eighth Amendment. For example, in *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 798-808 (1994), Justices Scalia and Thomas argued in dissent that the *Halper* "as applied" analysis is not workable for Double Jeopardy cases, but suggested that it is viable for purposes of the Eighth Amendment.

> The Excessive Fines Clause — which was rescued from obscurity only after *Halper* was decided . . . — may well support the judgment in *Halper*. Indeed, it may even *explain* the judgment in *Halper* since much of the language of that opinion suggests that the Court was motivated by concern for the harsh consequences of applying [the penalty].

511 U.S. at 803 n.2 (Scalia, J., dissenting). Similarly, in *Hudson* Justice Breyer indicated that *Halper*'s "as-applied" analysis may be relevant for purposes of the Excessive Fines Clause:

> [T]he Court in *Halper* might have reached the same result through application of the constitutional prohibition of "excessive fines." . . . [N]othing in the majority's opinion today explains *why* we should abandon this aspect of *Halper*'s holding. . . . [The Court's analysis] does not suggest that there may not be further analysis of a penalty as it is applied in a particular case. . . . It seems to me quite possible that a statute that provides for a punishment that normally is civil in nature could nonetheless amount to a criminal punishment as applied in special circumstances.

522 U.S. at 116 (Breyer, J., concurring). The majority in *Hudson* rejected the *Halper* "as-applied" analysis as a basis for a Double Jeopardy challenge, but noted: "[S]ome of the ills at which [the 'as-applied' analysis] was directed are addressed by other constitutional provisions. . . . The Eighth Amendment protects against excessive civil fines, including forfeitures." 522 U.S. at 103. *See also United States ex rel. Marcus v. Hess*, 317 U.S. 537, 553-556 (1943) (Frankfurter, J.,

concurring) (Double Jeopardy Clause does not apply to a statute that is remedial, although oppressive use of the statute in a particular case may be limited by the Eighth Amendment).

Given the findings made by the trial court, full forfeiture of $394,000 worth of diamonds and jewelry is invalid either under Due Process analysis or under the Eighth Amendment. However, because this Court has not made clear whether there are constitutional limits on civil *in rem* forfeitures and, if so, what those limits are, the Ninth Circuit allowed full forfeiture even though there is no rational basis for such forfeiture. Thus, the Petitioner respectfully requests this Court to grant a writ of certiorari to answer the question of what constitutional limits apply to civil remedial forfeitures.

B. In The Alternative, This Court Should Grant a Writ of Certiorari and Remand the Case for Consideration of Petitioner's Statutory Arguments.

In addition to the Constitutional arguments presented above, Petitioner also presented statutory arguments in his appeal to the Court of Appeals. In particular, Petitioner argued that in light of the entire statutory scheme set forth in 19 U.S.C. § 1401, *et seq.*, the district court has authority to afford Petitioner relief if full forfeiture is not consistent with the underlying remedial purposes of the statute. For example, in *United States v. Edwards*, 368 F.2d 722 (4th Cir. 1966), *cited with approval in United States v. U.S. Coin and Currency*, 401 U.S. 715, 723 (1971), the Fourth Circuit rejected the government's argument that if the predicate for the forfeiture was established at trial, then the district court had no authority to do anything but order full forfeiture. The Fourth Circuit held that under the statutory

scheme the district court has authority to hold a hearing on the fairness of the forfeiture and "may lawfully fashion appropriate relief." 368 F.2d at 723. *See also Peterson v. Richardson*, 370 F. Supp. 1259 (N.D. Tex. 1973), *aff'd*, 508 U.S. 45 (5th Cir. 1975), *cert. denied*, 423 U.S. 830 (1975), *described with approval*, *Halper*, 490 U.S. at 450 (disallowing full forfeiture as "unreasonable and not remotely related" to the government's costs).

The Ninth Circuit did not even address Petitioner's statutory arguments in its decision. This is an error that should be corrected by this Court. In order to assure consideration of an issue by the court of appeals, the appellant must raise the issue in the "Statement of Issues" and pursue it in the "Legal Argument" section of the opening brief. That is all that the Federal Rules of Appellate Procedure require. Rule 28(a). *See, e.g.*, *Larez v. City of Los Angeles*, 946 F.2d 630, 637 (9th Cir. 1991) (the failure to include a specific statement of an issue "does not warrant our bypassing the merits of the appeal" if the issue could otherwise "be gleaned" from the brief). Petitioner is entitled to a decision from the Court of Appeals on his statutory arguments as well as his constitutional arguments. If this Court decides not to consider the Constitutional arguments above, then Petitioner requests at least that this case be remanded for consideration of his statutory arguments.

CONCLUSION

Petitioner requests that this Court grant the petition for a writ of certiorari. In the alternative, Petitioner requests this Court to vacate the decision of the Ninth Circuit Court of Appeals and remand for consideration of Petitioner's statutory arguments.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED MARCH 19, 2001

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-35514

D.C. CV-98-00068-WLD

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

IVAN VAN RIJK,

Claimant-Appellant

and

847 PIECES OF JEWELRY and
370 PRECIOUS STONES,

Defendant.

MEMORANDUM[1]

Appeal from the United States District Court
for the Western District of Washington
William L. Dwyer, District Judge, Presiding

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1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Appendix A

Submitted March 8, 2001[2]
Seattle, Washington

Before: PREGERSON, THOMAS, and GOULD, Circuit Judges.

Ivan Van Rijk ("Van Rijk"), a professional jeweler, appeals the district court's judgment of forfeiture of 847 pieces of jewelry and 370 precious stones valued at $394,000. Van Rijk attempted to transport this merchandise across the border into the United States from Canada without declaring it.

The government seeks forfeiture of the merchandise pursuant to 19 U.S.C. § 1497.[3] Van Rijk concedes that he violated federal laws requiring that he declare the jewelry and precious stones at the border. Rijk contends, however, that the government's demand that he forfeit $394,000 worth of merchandise constitutes an excessive fine under the Eighth Amendment to the United States Constitution.[4]

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2. The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

3. Title 19 U.S.C. § 1497 provides:

> Any article which is not included in the declaration and entry as made or transmitted; and is not mentioned before examination of the baggage begins in writing by such person, if written declaration and entry was required, or orally, if written declaration and entry was not required; shall be subject to forfeiture. . . .

4. The Eighth Amendment states:

(Cont'd)

Appendix A

Finding for the government, the district court relied on this circuit's decision in *United States v. $273,969.04 U.S. Currency, Regina A. Puzo, Claimant*, 164 F.3d 462, 466-67 (9th Cir. 1999). The district court's order states that our decision in *Puzo* "requires that a judgment of forfeiture be entered as to all jewelry and precious stones." We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Our decision in *Puzo* involved an individual who entered the United States without declaring four pieces of jewelry valued at $117,500. *Id.* at 464. The government brought a civil action in rem pursuant to 19 U.S.C. § 1497 to forfeit the jewelry. *Id.* Puzo challenged the forfeiture as unconstitutional under the Excessive Fines Clause of the Eighth Amendment. *Id.*

We affirmed the district court's grant of summary judgment for the government with respect to this claim. Relying on the Supreme Court's interpretation of 19 U.S.C. § 1497 as "entirely remedial and thus nonpunitive," we held that § 1497 forfeitures do not fall within the purview of the Excessive Fines Clause. *Id.* at 466 (quoting the *United States v. Bajakajian*, 524 U.S. 321, 344 n.19 (1998)).[5]

(Cont'd)

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const., Amdt. 8.

5. Our decision in *Puzo* is grounded in the Supreme Court's interpretation of the Excessive Fines Clause as placing " 'limits [on]

(Cont'd)

Appendix A

The instant case is factually and legally indistinguishable from *Puzo*. Van Rijk, like Puzo, admitted to attempting to enter the United States without declaring jewelry valued in excess of $100,000. The government brought a civil in rem action pursuant to 19 U.S.C. § 1497, precisely as it did in *Puzo*. Therefore, we agree with the district court that our decision in *Puzo* "requires that a judgment of forfeiture be entered as to all jewelry and precious stones" that Van Rijk attempted to bring undeclared into the United States.[6]

The Judgment of the district court is AFFIRMED.

(Cont'd)
the government's power to extract payments, whether in cash or in kind, as punishment for some offense.' " *Bajakajian*, 524 U.S. at 328 (quoting *Austin v. United States*, 509 U.S. 602, 609-10 (1993)). Forfeitures are only considered "fines" within the meaning of the Excessive Fines Clause "if they constitute punishment for some offense." *Id.* Civil forfeitures conducted for remedial purposes are by definition not punishment and therefore not "fines" subject to review under the Excessive Fines Clause. *Puzo*, 164 F.3d at 465 n.2 (observing that the Supreme Court has interpreted the forfeiture provision of § 1497 as "not so unreasonable or excessive that it transforms what was clearly intended as a civil remedy into a criminal penalty") (citation and internal quotation marks omitted).

6. Van Rijk also claims that the forfeiture of his jewelry and precious stones violates the substantive due process clause of the Fifth Amendment because there is no rational basis for this forfeiture. There is no authority to support the application of the due process clause to overturn a civil forfeiture as an excessive fine. Moreover, the Supreme Court has stated that civil in rem forfeitures conducted pursuant to 19 U.S.C. § 1497 serve a rational purpose by deterring individuals from bringing undeclared goods into the United States. *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 237 (1972).

APPENDIX B — JUDGMENT OF FORFEITURE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE DATED, FILED AND ENTERED APRIL 26, 1999

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C98-0068WD

UNITED STATES OF AMERICA,

Plaintiff,

v.

847 PIECES OF JEWELRY
AND 370 PRECIOUS STONES,

Defendants.

JUDGMENT OF FORFEITURE

Plaintiff, United States of America filed its Verified Complaint for Forfeiture herein on January 16, 1998. The Complaint alleged that the defendant jewelry and precious stones are subject to seizure and forfeiture to the United States pursuant to Title 19, United States Code, Section 1436(d) for violation of Title 19, United States Code, Section 1433(b)(2)(B), and pursuant to Title 19, United States Code, Sections 1497(a)(1) and 1595a(c)(1)(A).

Appendix B

On January 16, 1998, a Warrant of Arrest *In Rem* was issued to arrest the defendant jewelry and precious stones. The United States Customs Service has filed a return certifying that the defendant jewelry and precious stones were arrested on January 23, 1998.

On January 26, 1998, Claimant Ivan Van Rijk filed a Notice of Appearance and Claim to the defendant jewelry and precious stones. On February 13, 1998, Claimant Ivan Van Rijk filed an Answer.

No other claims have been made to the defendant jewelry and precious stones and no other parties have appeared in this action.

On August 27, 1998, the United States filed a Motion for Summary Judgment. On October 8, 1998, the court denied the plaintiff's Motion for Summary Judgment, but held that the defendant jewelry was forfeitable to the United States pursuant to Title 19, United States Code, Section 1497. The matter came to trial on November 17, 1998, on the issue of the application of the Eighth Amendment Excessive Fines Clause to the defendant jewelry and precious stones.

In its findings of fact and conclusions of law entered in open court pursuant to Fed.R.Civ.P.52 on November 20, 1998, the court ruled that "the United States is entitled to forfeit the 847 pieces of jewelry and 370 precious stones that are the subject matter of this case except to the extent that the forfeiture would violate the Excessive Fines Clause of the Eighth Amendment," and then reduced the amount of the forfeiture, applying the Excessive Fines Clause of the Eighth Amendment.

Appendix B

On November 30, 1998, the United States timely moved for a new trial pursuant to Rule 59(e). The United States subsequently timely moved for reconsideration of the December 22, 1998 order denying its Rule 59(e) motion for a new trial or to alter or amend the judgment entered on November 20, 1998. By order entered January 25, 1999 the court vacated the judgment previously entered following the Ninth Circuit's opinion in *United States v. $273,696.04 and Regina A. Puzo, Claimant*, 164 F.3d 462 (9th Cir. 1999). The Mandate was issued by the Ninth Circuit on March 2, 1999 and forwarded to the United States District Court for the Western District of Washington on April 8, 1999. The Ninth Circuit in *Puzo* held that a forfeiture of jewelry under Title 19, United States Code, Section 1497 is not subject to application of the Excessive Fines Clause. The court stated:

> Applying the analysis used above, we might well conclude that 19 U.S.C. § 1497 is also punitive for purposes of the Excessive Fines Clause. However, the Supreme Court in *Bajakajian* said that § 1497 is 'entirely remedial and thus nonpunitive.' *Bajakajian*, 524 U.S. at __ n.19, 118 S.Ct. at 2041 n.19 (citing *Emerald Cut Stones*, 409 U.S. at 237, 93 S.Ct. 489). Although *Emerald Cut Stones* interpreted § 1497 in the context of the Double Jeopardy Clause, *Bajakajian* clearly intended *Emerald Cut Stones* to apply in the context of the excessive Fines Clause as well. Section 1497 thus fails the precondition for application of the Excessive Fines Clause. We therefore affirm the district court's grant of summary judgment for the

government regarding the forfeiture of Puzo's jewelry under § 1497.

Therefore, *Puzo* requires that judgment of forfeiture be entered as to all of the defendant jewelry and precious stones.

IT IS HEREBY ORDERED, ADJUDGED and DECREED as follows:

1. The defendant 847 pieces of jewelry and 370 precious stones are forfeited to the United States of America pursuant to 19 U.S.C. § 1497, and no right, title or interest in the defendant jewelry and precious stones shall exist in any other party.

2. The United States Customs Service shall dispose of the defendant jewelry and precious stones in accordance with the law.

3. Plaintiff, United States is the prevailing party and will recover taxable costs, to be deducted from the cost bond submitted to the United States Customs Service by Ivan Van Rijk. Any balance of the cost bond remaining after said costs have been deducted shall be returned to the claimant, Ivan Van Rijk.

4. The United States Customs Service shall deduct any and all remaining costs incurred in the judicial forfeiture proceedings or any related expenses attributable to the judicial forfeiture proceedings including the seizure, maintenance, publication of notice, and forfeiture of the defendant jewelry and precious stones from the proceeds of the sale of the jewelry and precious stones.

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5. The Clerk of the Court shall serve a copy of this Judgment of Forfeiture on each party of record and deliver three (3) certified copies to the Office of the United States Attorney, Seattle, Washington.

DATED this 26th day of April, 1999.

s/ William L. Dwyer
UNITED STATES DISTRICT JUDGE

Presented by:

s/ Richard E. Cohen
RICHARD E. COHEN, WSBA #91005
Assistant United States Attorney

APPENDIX C — TRANSCRIPT OF ORAL JUDGMENT ON TRIAL TO THE COURT AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE DATED, FILED AND ENTERED NOVEMBER 20, 1998

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case C98-68WD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

847 PIECES OF JEWELRY and
370 PRECIOUS STONES,

Defendants.

November 20, 1998
2:15 p.m.

ORAL JUDGMENT ON TRIAL TO THE COURT
BEFORE THE HONORABLE WILLIAM L. DWYER
UNITED STATES DISTRICT JUDGE

* * *

Appendix C

[2] Seattle, Washington; Friday, November 20, 1998; 2:15 p.m.

THE COURT: I've considered now all the evidence received, including the live testimony, the exhibits, the deposition of Dr. Greenberg, and I've considered the briefs and arguments of counsel. And I can give you now the decision in this case. What I'm about to say will constitute the findings of fact and conclusions of law under Rule 52 of the Federal Rules of Civil Procedure.

This is a civil forfeiture case brought by the United States pursuant to several statutes, including 19 U.S. Code Sections 1436(d) and 1497(a)(1).

The property sought to be forfeited consists of 847 pieces of jewelry and 370 precious stones. The claimant, who contends that the forfeiture would be unconstitutional under the Eighth and Fifth Amendments, is Ivan Van Rijk.

An order was entered on October 8, 1998 on the Government's motion for summary judgment and the claimant's motion for return of the property. That's Docket No. 30. To place the case in context, I will quote briefly from that order.

Quote: The United States, plaintiff in this case, seeks forfeiture of jewelry and precious stones that were seized by Customs officials after Ivan Van Rijk failed to declare that they were in his possession while crossing the U.S./Canadian border. Van Rijk, the claimant, argues that such a forfeiture would constitute an excessive fine under the Eighth

Amendment [3] of the United States Constitution and that the items, therefore, should be returned to him. Whether that contention is correct and whether the forfeiture would violate the due process clause of the Fifth Amendment will depend upon issues that must be resolved at trial. Unquote.

Going on to say, quote: It is uncontested that the claimant violated the declaration and presentation requirements on November 28, 1993. He argues that his property cannot lawfully be forfeited because he lacked the requisite intent under the statute and, at a minimum, that summary judgment would be inappropriate because his intent must be examined by the fact-finder. But the civil forfeiture provisions, although they turn on a person's conduct, contain no element of mens rea. Unquote.

Going on to say, quote: Because claimant failed to declare the jewelry when he crossed the border, the Government is entitled to forfeiture as a matter of law, unless the forfeiture would be unconstitutional. Unquote.

And going on further to say, quote: Under the statutory forfeiture provisions the United States is entitled to forfeit the claimant's property, regardless of his state of mind. Whether the forfeiture would be constitutional under the Fifth and Eighth Amendments, however, must be resolved at trial. Accordingly, plaintiff's motion for summary judgment and claimant's motion for return of property are denied. Unquote.

[4] The final pretrial order was entered accordingly on November 6th, 1998 defining the issues for trial and listing witnesses and exhibits. That's Docket No. 44.

Appendix C

The findings I am about to state are based upon stipulations of the parties or, where not stipulated, upon a preponderance of the evidence. The burden of proof is on the claimant to show that the forfeiture would be unconstitutional. However, if the burden were placed on the Government — in other words, if the burden of proof were reversed — the findings in this case would be the same, because these findings are all made on the basis of having been established by a preponderance of the evidence.

First, I find as facts the facts agreed upon by the parties in the pretrial order. These are at the top of page 3. And so they'll be conveniently accessible, I'll read them into the record now as part of this decision.

The agreed facts are as follows:

1. Ivan Van Rijk drove to the U.S./Canadian border at the Blaine Peace Arch on November 28, 1993, driving a gray BMW with British Columbia license plates LEL645.

2. Upon his arrival at the border, Ivan Van Rijk did not declare the jewelry and loose stones (diamonds) that were contained in a nylon bag in the trunk of the BMW.

3. After Van Rijk was directed to secondary inspection by the U.S. Customs inspector, Van Rijk failed to present himself [5] for secondary inspection and drove into Blaine, Washington.

Those are the agreed facts.

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Now, beyond those and by a preponderance of the evidence, I find that on November 28, 1993 Mr. Van Rijk was suffering from a high degree of anxiety and emotional upset over business and personal matters but was not suffering at that time from a major depression or from any psychotic illness or symptoms.

Later, after the events of November 28, he did go through a very difficult period, including major depression and a period of hospitalization in Vancouver, B.C. Fortunately, he responded well to treatment, and he has made a good recovery. But the important time for present purposes is November 28, 1993, not December '93 or early 1994. And on November 28 although he was upset and disturbed, he was able to think and plan rationally.

On that date he put the whole inventory of his jewelry business into the trunk of his car. He packed belongings for a trip, and he set out for the United States intending to sell the gems and jewelry in this country at what he believed would be better prices than could be obtained in Canada. He intended to bring these articles in without declaring them, although he did know of the declaration requirement. He took with him his then fiancee because, as he later stated, it would make it easier to get across the border with the two of them appearing to be a couple out for a short shopping trip in the United [6] States.

But at the border, an alarm went off when his license plate number was punched into a computer. He then became frightened, drove away, failed to stop at the secondary inspection station, drove into the town of Blaine and was

eventually arrested by a Blaine police officer and then was interrogated by Customs officials. He promptly signed a statement admitting the substance of what I've just said.

Now, this episode certainly reflected poor judgment and no doubt was influenced by Mr. Van Rijk's emotional condition at the time. But there has not been shown and I find there was not any basis to reduce responsibility based on diminished mental capacity or based upon the inability to control his own acts.

He did immediately regret what happened, and ever since that time he's been attempting to overcome the effects of this regrettable incident and to overcome or mitigate the forfeiture.

There is evidence in the record that would suggest that these articles were the property of a corporation owned by Mr. Van Rijk. To the extent that ever may have been true, I find that he has succeeded to any ownership interest of the corporation, and the property belongs to him until and unless forfeited.

As to the value of these gems and items of jewelry, the [7] parties agree on the appraisal made by Mr. Druxman showing values as of November 28, 1993 as follows. 370 loose diamonds: $105,000. 847 items of jewelry: $289,000. Total value: $394,000.

We must deal first with the Fifth Amendment claim that Mr. Van Rijk was subjected to delay of unconstitutional proportions.

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The administrative process did take a long time before this judicial forfeiture action was commenced, but the record shows that the delay was due chiefly to the claimant's requests for additional time. He was seeking remission or mitigation of the forfeiture. He made a number of requests for more time. The agency responded reasonably to those requests. Administrative decisions were made, negotiations were engaged in and settlement negotiations after the matter was referred to the U.S. Attorney.

Looking at the entire record of the proceedings, I find that the claimant was not subjected to any unwarranted delay and that there has been no violation of his Fifth Amendment rights.

The central question in the case is whether the forfeiture would be excessive under the standards of the Eighth Amendment Excessive Fines Clause. As other courts and commentators have noted, the Supreme Court's recent pronouncements in regard to forfeitures have not been entirely clear. But looking at all [8] the recent cases as well as the earlier ones, I believe the correct answer can be divined in this case.

The first question is this. Does the categorization of a forfeiture as a civil in rem forfeiture, in and of itself, remove the case from any possible application of the Excessive Fines Clause? More specifically, does the forfeiture attempted here escape Eighth Amendment scrutiny automatically simply because it is a civil in rem forfeiture connected with a Customs violation?

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The answer is provided by the Supreme Court in two footnotes in the recent case of United States versus Bajakajian, 118 Supreme Court 2028, 1998.

The first one reads as follows. Quote: Even if the Government were correct in claiming that the forfeiture of respondent's currency is remedial in some way, the forfeiture would still be punitive in part. (The Government concedes as much). This is sufficient to bring the forfeiture within the purview of the Excessive Fines Clause. Unquote.

And the Court then cites Austin versus United States, 509 U.S. 602, 1993.

What I've just read is Note 4 in the Bajakajian decision.

The other note reads as follows. Quote: It does not follow, of course, that all modern civil in rem forfeitures are nonpunitive and thus beyond the coverage of the Excessive Fines Clause. Because some recent federal forfeiture laws have [9] blurred the traditional distinction between civil in rem and criminal in personam forfeiture, we have held that a modern statutory forfeiture is a fine for Eighth Amendment purposes if it constitutes punishment even in part, regardless of whether the proceeding is styled in rem or in personam. Unquote.

That is Note 6 in the Bajakajian decision.

A number of lower court cases have discussed Bajakajian. I don't think those decisions need to be cited here. What it comes to is this. The Government's position

that the mere categorizing of this forfeiture in the way it is categorized in the statutes immunizes it from Eighth Amendment scrutiny cannot be squared with the statements that I've just quoted from the Supreme Court or with a number of other recent holdings of the Supreme Court and of other federal courts.

To take a hypothetical that was discussed during argument, the Government's position that even if the value here were $4 million rather than $400,000 that there still could be no excessive fines analysis, I don't believe can be squared with current constitutional law.

The second question, then, is this. Is this forfeiture punitive in part? If it goes clearly and substantially beyond any possible remedial purpose, the answer must be yes.

Congress has called these forfeitures penalties in 19 U.S. Code, Sections 1436 and 1497. More importantly, the forfeiture here clearly is punitive in part in both purpose and [10] effect. To forfeit $394,000 worth of property on the basis of what happened here would manifestly go far beyond any possible remedial purpose.

It follows, then, that the forfeiture must be tested under the Excessive Fines Clause.

That test, in turn, is this. A punitive forfeiture is excessive within the meaning of the Eighth Amendment if it is grossly disproportional to the gravity of the defendant's offense.

Appendix C

Looking at the factors here that bear on the gravity of Mr. Van Rijk's offense.

First, there is a claim on his part of partial exoneration based on a mental condition. I've dealt with that already. As I've said, he was disturbed and upset, but his mental condition was not such as to provide substantial mitigation either under the diminished capacity standard of the U.S. Sentencing Guidelines or under any other relevant standard.

Another factor is this. The Government has argued that Mr. Van Rijk was an habitual smuggler and that what happened on November 28, 1993 should be looked at in that light.

I find that the contention that he was a habitual smuggler is not substantiated by the evidence. There was one earlier incident involving a single diamond, apparently the property of another person, at Point Roberts, Washington which was settled for a $475 payment. That falls far short, and nothing else in [11] the record approaches a showing of his having been an habitual or frequent smuggler.

So what we're left with is a single occurrence involving a man in his 50s who, as far as the evidence shows, engaged for many years in a legitimate jewelry business and in this instance attempted to bring gems and items of jewelry into the United States without declaring them. These goods, of course, are not contraband or prohibited items.

Looking, then, at the dimensions of that offense. An important factor is the duty that would have been payable.

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The loose diamonds were duty-free. As to the items of jewelry, some of them — perhaps most of them — apparently were manufactured in Canada or the United States and, if properly documented, could have come in duty-free under what at that time was the U.S./Canada Free Trade Agreement and has since been superseded by NAFTA.

But these items were not properly documented for duty-free import, and the Court must view the situation as it was then. This was a commercial shipment, no part of which would have qualified for duty-free importation under the U.S./Canada Free Trade Agreement.

The duty, then, needs to be computed as follows. The applicable rate at that time was 6.5 percent times $289,000, yielding a figure of $18,785.

I must say that I have considerable doubt that if this [12] importation had gone through the normal legal process that the applicable duty would have turned out to be that or even close to that. I think there would have been a very substantial number of duty-free items. But we have to take the situation as it then was for the reasons I've expressed.

Also, consideration must be given to the loss of processing fees in the amount of $400; those two items, then, adding up to $19,105.

The Government is also entitled on a remedial basis to liquidated damages. The evidence is thin in that regard. Clearly, there was expense to the Government, and there always is in activities of this nature. It is an expensive

apparatus to maintain the border inspection, examination and reporting service.

The United States Attorney has suggested $50,000 in liquidated damages. I have looked at the guidelines that were cited. These are a little different. These are penalty guidelines at 19 C.F.R., Part 171, Appendix A, 1993.

These suggest six to eight times the duty owed on dutiable items and 5 to 10 percent of the domestic value of duty-free items.

But in this instance, it would not be fair to use those figures because of the manifest softness of the duty figure itself that I've had to express and the absence of a suitable basis to give a lower duty figure.

[13] The best solution at hand, I believe, is this. And this is the solution the Court will adopt. The United States Attorney's suggestion of $50,000 is reasonable, given the size and nature of this particular event and the expenses to which the Government is put here and chronically is put in occurrences of this nature.

So the remedial entitlement comes to $19,105 plus $50,000, or $69,105.

The next item to consider is what a constitutional penalty would be bearing in mind that if we are analyzing under the Excessive Fines Clause, as we are, that doesn't reduce the Government just to a civil compensatory remedy. By definition, we're talking about a penalty, as well.

Appendix C

A helpful comparison is provided by the United States Sentencing Guidelines. And in this respect the 1993 guidelines in effect at the time and the 1998 guidelines in effect now are the same. Under Guideline Sections 2T3.1, 2T4.1 and 5E1.2, the outcome would be as follows.

There would be an offense level — the offense level is based on the lost duty and fees — of 11 and a guideline fine range of 2,000 to $20,000. The middle of that range is $11,000. I see no reason at all why, on this record and given what we know about Mr. Van Rijk's past life and experience, that a reasonable fine would be anything in excess of the middle of that range. In other words, anything in excess of $11,000. [14] When that is added to the subtotal I announced before, the total remedial recovery to the Government and the penalty proportionate to the offense come to a total of $80,105.

Viewed in that light, then, is the attempted forfeiture of property the value of which is $394,000 grossly disproportional to the gravity of the offense? I have no doubt that it is and that a forfeiture of the full properties involved here would be, in substance, an excessive fine in violation of the Eighth Amendment. $394,000 is almost five times as great as the full amount of the remedial items and the reasonable penalty that the Court has found.

It follows that the claimant is entitled to relief. It should also be mentioned that the cash and the car were separate items. They are not sought to be forfeited in this case and there are separate provisions of statutory law that apply to them, so the credit that the claimant has sought for the amount

paid to retrieve his car and the amount either agreed upon or apparently still being discussed to retrieve his cash cannot be considered in today's computation.

Now, as to the relief that will be ordered. The parties have agreed during argument that the Court can fashion an order to accomplish an appropriate result. And based upon the findings made, the conclusions of law and judgment will be as follows.

The Court, of course, has jurisdiction in this case. Based [15] upon the findings of fact just made, judgment will be entered to the following effect: That forfeiture of the gems and jewelry will be remitted upon the payment by the claimant, Ivan Van Rijk, to the United States of $80,105. If that amount is not paid within a certain number of days which I'll discuss with counsel in a moment, the Government may then sell the seized properties, retain the amount to which the Government is entitled and remit the balance to the claimant.

Now, without prejudice to anyone's position on the merits, I'd like to invite your comments on the length of time for Mr. Van Rijk to pay and then, if he doesn't pay, the length of time thereafter for the Government to sell.

MR. PAUW: I guess we would suggest a 90-day period after the appeal period has expired. In other words, the appeal period — which I guess would be 60 days — and then plus 90 days after that.

THE COURT: Mr. Cohen?

MR. COHEN: No objection to that.

THE COURT: Sixty days, I take it, then, after the appeal period expires or after any appeal is finally decided?

MR. COHEN: I believe it was 90 days, Your Honor.

THE COURT: Or 90 days, rather. Is that what you have in mind, Mr. Pauw?

MR. PAUW: Yes, it is.

THE COURT: And then what period of time should the [16] Government have to sell the property if payment is not timely made?

MR. PAUW: What we would propose, I guess, is that the Government be allowed to sell enough to cover the amount that would be owing, and then the balance of the jewelry or what is left over would be returned to Mr. Van Rijk.

MR. COHEN: I would like to suggest 90 days.

With respect to the last suggestion, I think if it gets to that point, then we could work with counsel as far as doing what is necessary. I'd just as soon that not be in the order, but I think it's something that we'd be willing to negotiate.

THE COURT: How about the 90-day period for the Government to sell?

MR. PAUW: I think that would be acceptable, Your Honor.

THE COURT: All right. Judgment will be entered today accordingly.

Do counsel have any questions or anything else to take up?

MR. COHEN: No, Your Honor.

MR. PAUW: No, Your Honor.

THE COURT: My thanks to counsel on both sides, and we'll be in recess.

(The proceedings concluded at 2:50 p.m.)

* * * *

Appendix C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C98-68WD

UNITED STATES OF AMERICA,

Plaintiff,

v.

847 PIECES OF JEWELRY AND
370 PRECIOUS STONES,

Defendants.

JUDGMENT

Based upon the findings of fact and conclusions of law entered in open court pursuant to Fed. R. Civ. P. 52 on November 20, 1998, judgment is now entered as follows:

1. The United States is entitled to forfeit the 847 pieces of jewelry and 370 precious stones that are the subject matter of this case except to the extent that the forfeiture would violate the Excessive Fines Clause of the Eighth Amendment.

2. Forfeiture of all of these items of property, having a total value of $394,000, would violate the Excessive Fines Clause of the Eighth Amendment. The United States is entitled, however, to forfeit a total value of $80,105.

3. Forfeiture of the aforesaid precious stones and jewelry will be remitted upon payment by the claimant, Ivan Van Rijk, to the United States, within ninety days following the expiration of the appeal period or following the final disposition of any appeal, of $80,105.

4. If the claimant fails to make payment within the time specified, the United States shall sell the seized property, retain the amount to which it is entitled, and remit the balance to the claimant. Any such sale must be made within ninety days following expiration of the time for the claimant to make payment.

5. Claimant Ivan Van Rijk, having obtained substantial relief, is the prevailing party and will recover taxable costs.

The clerk is directed to send copies of this judgment to all counsel of record.

Dated: November 20, 1998

s/ William L. Dwyer
William L. Dwyer
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JUNE 4, 2001

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-35514

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

IVAN VAN RIJK,

Claimant/Appellant,

and

847 PIECES OF JEWELRY and
370 PRECIOUS STONES,

ORDER

Before: PREGERSON, THOMAS, and GOULD, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

Appendix D

The suggestion for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.